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GROUPME, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BRIAN GLAUSER, individually and on behalf of a class of similarly situated individuals,

Plaintiffs,

v.

TWILIO, INC., a Delaware corporation; and GROUPME, INC., a Delaware corporation,

Defendants.

CASE NO. 4:11-cv-02584-PJH

DEFENDANT GROUPME, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE AMENDED COMPLAINT, TO STAY THE ACTION OR TRANSFER VENUE

[Filed Concurrently With Notice of Motion and Motion; Declarations of Steve Martocci and J. Jonathan Hawk; Request for Judicial Notice; and Proposed Order]

Complaint Filed: May 27, 2011
Date: January 25, 2012
Time: 9:00 a.m.
Courtroom: 3
Judge: Hon. Phyllis J. Hamilton

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On April 23, 2011, Plaintiff and ten other people received a text message from their friend, inviting them to play poker. Plaintiff, within two hours of receiving that text message, responded to the entire "Poker" group with his own social text message, and a group text message conversation ensued about social matters. Plaintiff thereafter registered with GroupMe to create and send his own group text messages using its service.

Approximately one month after participating in the "Poker" group text messaging conversation, Plaintiff filed this putative class action against GroupMe and defendant Twilio, Inc. ("Twilio"), alleging violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, *et seq.* (the "TCPA"). Plaintiff alleges that GroupMe, without his consent, "spammed" him on April 23 with text messages – the same text messages he received as part of his "Poker" group. Plaintiff alleges that, to send such "wireless spam" "*en masse*,"[1] GroupMe used an "automatic telephone dialing system" (also an "auto-dialer") as the TCPA defines that term. Plaintiff's claim is not only without merit but, important here, insufficiently pleads GroupMe's purported use of an auto-dialer, which is an element of any TCPA violation.

The only allegation in the Amended Complaint even suggesting GroupMe's technology, through which Plaintiff and the other "Poker" group participants exchanged their group text messages, constitutes an auto-dialer is that it "upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." That allegation, in addition to being made upon information and belief, is a mere recitation of the TCPA's definition of auto-dialer and does not make it plausible, *i.e.* more likely than not, GroupMe violated the TCPA. Moreover, it is contradicted by well-pleaded factual allegations in the Amended Complaint that GroupMe, in fact, did **not** use auto-dialer capabilities when "sending" Plaintiff his "Poker" group text messages.

Further, two issues raised by Plaintiff's claim are matters of first impression that the Court

[1] Notably, the Amended Complaint also truthfully alleges that GroupMe group sizes are limited to twenty-five people. As a result, no one text message can be delivered to a greater number of people.

should refer to the Federal Communications Commission ("FCC") under the doctrine of primary jurisdiction. The FCC, as the administrative agency that is Congressionally-charged with adopting regulations to implement the TCPA's requirements, has created a complex regulatory scheme to ensure uniform enforcement and application of the statute. Most recently, the FCC issued a 2010 Notice of Proposed Rulemaking on the TCPA and is currently holding a related parallel proceeding to resolve the form and content of "consent" a caller must obtain from a called-party in order to avoid violating the TCPA. That FCC proceeding is also likely to address, as urged by many commentators, how to adapt the definition of "auto-dialer" to apply to modern technology that was not anticipated twenty years ago when the statute was enacted. Both of these issues – the "consent" defense and the definition of "auto-dialer" – are central to this case.

The Court should not, in the midst of an FCC proceeding on the issue, attempt to decide whether GroupMe, as it will claim pursuant to a 1992 FCC regulation on the TCPA, obtained the appropriate consent from Plaintiff and the other members of the putative class to participate in group texting because those individuals released their cellular telephone numbers. Likewise, the Court should not attempt to apply a twenty-year old definition of "auto-dialer to GroupMe's "emerging" and "alternative" technology that employs virtual, voice over Internet-Protocol ("VoIP") "long code" telephone numbers, enabled to carry voice and text messages over the Internet. The FCC is the administrative agency charged with addressing such issues and is in the process of doing so.

Lastly, if the Court finds the Amended Complaint is sufficiently pleaded (which it is not) or referral to the FCC is not appropriate (which it is), this case should be transferred under 28 U.S.C. § 1404(a) to the Eastern District of Virginia, Richmond Division. Plaintiff, a Virginia domiciliary, has not pleaded any significant contacts with this District and the bulk of the evidence, including key witnesses, are located on the east coast.

II. STATEMENT OF ISSUES

1. Does the Amended Complaint state a claim, based on factual allegations, from which it is plausible, *i.e.*, not merely possible, that GroupMe sent text messages to Plaintiff using an "automatic telephone dialing system" as the TCPA defines that term?

2. Should this case be dismissed or stayed pursuant to the doctrine of primary jurisdiction pending the FCC's determination of one or both of the following issues presented in this case:

> (a) what is the precise form (*i.e.*, oral or written) and content of the "prior express consent" a party sending a text message to a cellular telephone is required to obtain from the called-party before sending the text message so as not to violate the TCPA; and
>
> (b) how will the definition of "auto-dialer," currently based on functionalities that were rare in 1991, be revised so that it can be applied to new and emerging technologies without encompassing the most common of everyday devices, such as smartphones?

3. Should this case be transferred, pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Eastern District of Virginia, Richmond Division, where Plaintiff and third-party witnesses reside and many of the computer servers implicated in the Amended Complaint are located?

III. BACKGROUND

A. GroupMe[2]

Stemming from their desire to create a group messaging system that would allow them to better communicate with each other and friends at music festivals, Jared Hecht and Steve Martocci founded GroupMe in New York City in June 2010. Martocci Decl., ¶ 4. GroupMe, for which Martocci built the initial prototype of the service, is based on a simple idea: create the easiest way for people to start conversations and keep in touch with their families, friends and real life networks using private Short Message Service ("SMS") groups. Martocci Decl., ¶¶ 1, 4, 5. Indeed, since its inception in mid-2010, GroupMe has been used by a wide range of real life networks to communicate, including by cancer support groups and student organizations, and the most common group names currently on the service are "Mom" and "Dad." Martocci Decl., ¶ 5.

[2] The background in this section is provided only for GroupMe's primary jurisdiction and transfer arguments. GroupMe's Rule 12(b)(6) argument does not rely on or reference this section and is strictly limited to the allegations of the Amended Complaint and judicially noticed materials.

GroupMe's potential uses, however, reach far beyond messaging for purely friendly, social purposes. When an outbreak of tornadoes devastated towns in the southern United States in April 2011, shutting down power and landlines and congesting data networks, people used GroupMe to check on family and friends. Martocci Decl., ¶ 20. Similarly, neighborhood watch groups have utilized GroupMe to communicate real-time emergencies, such as home invasions and car thefts. As GroupMe grows, it adds new features to change the way that individuals communicate with their surrounding communities. *Id.*

GroupMe works as follows: a user must register for GroupMe by visiting its website at www.groupme.com, where he types in his name, wireless phone number and email address. Martocci Decl., ¶ 7. The new user, in turn, receives a confirmation code and a welcome text message on his cellular telephone stating, approximately: "Welcome to GroupMe! Group texting, calling & more. Your confirmation code is MQZTP. Msg. & data rates may apply." Martocci Decl., ¶ 8. The new user completes his registration by typing that confirmation code into the GroupMe website, which verifies he owns the telephone number he initially entered during the registration process. *Id.* The registered user can then create texting groups of up to twenty-four individuals by entering the individuals' names and cellular telephone numbers. Martocci Decl., ¶¶ 8-9; Am. Compl., ¶ 12. Importantly, during the registration process, group creators must represent to GroupMe that they have obtained the consent of the individuals they add to groups. Am. Compl., ¶ 13.

Twilio's service works in conjunction with GroupMe's, providing connectivity to traditional telephone networks and to the Internet through application programming interfaces. Am. Compl., ¶ 18; Martocci Decl., ¶ 17. Twilio provides GroupMe with group phone numbers which GroupMe, in turn, assigns to text messaging groups organized through its service. Once a group is organized, each text message sent by a group member is sent to Twilio's systems and the unique number assigned to that group via the Internet. The text message is then routed by GroupMe over Twilio's systems for simultaneous delivery to the other group members. Am. Compl., ¶ 11; Martocci Decl., ¶ 17.

The text messages are delivered using the SMS protocol, limited to 160 characters per

message. Martocci Decl., ¶ 10. As a result, individual communications seeking to exceed 160 characters may be split into more than one text message for delivery. *Id.* The text messages are also delivered using "long code," as opposed to "short code." Am. Compl., ¶ 32; Martocci Decl., ¶ 11. A short code is a five or six-digit telephone number that can only deliver text messages in the United States to a mobile device and, to function, must be rented from and registered with the Common Short Code Administration ("CSCA") and connected to a mobile carrier. Martocci Decl., ¶¶ 12-13. The use of short code in mobile marketing is further regulated by two leading nonprofit industry trade groups that publish "Best Practices" on the subject, which are enforced by wireless carriers: the CTIA – The Wireless Association ("CTIA"), representing the wireless communications industry, and the Mobile Marketing Association ("MMA"), representing both wireless operators and marketers. *Id.*

Long code, by contrast, is a virtual, VoIP ten-digit telephone number enabled to carry both voice and text message traffic and can be deployed both domestically and internationally from a mobile device, landline, email or web-based application. Martocci Decl., ¶ 11. Long code essentially connects the wired and wireless systems; for example, a text message can be delivered via long code, and the recipient of that text message can then place a voice call to the sender via the same long code number. *Id.* The CTIA and MMA have not issued any mobile marketing "Best Practices" applicable to long code. Martocci Decl., ¶ 13.

When using GroupMe's service, its users have the option of either receiving notifications via text message or downloading the GroupMe Internet application and receiving push notifications on their smartphones via the Internet. Martocci Decl., ¶ 15. The GroupMe application specifically helps those users, who prefer not to receive text messages, participate in groups without being hindered by service limitations associated with their carriers' particular SMS plans (*e.g.*, geographic limitations and additional costs). *Id.* Approximately 40% of GroupMe messages are delivered by the application rather than via text message. *Id.*

Importantly, GroupMe is not a marketing service or tool. In fact, GroupMe has implemented numerous policies and procedures intended to prevent individuals from using the service for such purposes. For example, GroupMe has rules prohibiting spamming, and it limits

the size of each group and the number of groups that may be created from the same IP address to enforce that prohibition. Am. Compl., ¶ 12; Martocci Decl., ¶¶ 14, 21. Further, GroupMe limits the content it provides to users to informational messages that will be helpful, such as advising each group member that he has been added to a group, how to be removed from the group, and if the user does not participate in a group he will be removed from it by the service. Martocci Decl., ¶ 14; Am. Compl., ¶¶ 33, 35, 38.

GroupMe has never sent any "blast" SMS text messages to all GroupMe users and is technologically incapable of doing. Martocci Decl., ¶ 16. All messages, delivered to no more than twenty-five people at a time (the maximum group size), are triggered solely in response to the behavior of group creators and users. Am. Compl., ¶ 12; Martocci Decl., ¶¶ 8-9, 14-16.

B. Procedural History and Plaintiff's Claim

On May 27, 2011, Plaintiff filed a putative class action complaint against Twilio and GroupMe, alleging a single claim for sending text messages to cellular telephones in violation of the TCPA. Complaint, Dkt. No. 1. Twilio and GroupMe filed separate motions to dismiss the Complaint on August 25 and 28, 2011, respectively. Motions to Dismiss, Dkt. Nos. 21 and 23. Plaintiff did not oppose either motion and, instead, filed an Amended Complaint on September 15, 2011. Response to Motions and Amended Complaint, Dkt. Nos. 30 and 34, respectively.

The Amended Complaint, which Plaintiff filed as a putative class action, restates many of the original Complaint's factual allegations. The Amended Complaint alleges, in relevant part, that "[b]ulk text message, or SMS marketing, has emerged as a new and direct method of communicating and soliciting consumer business." Am. Compl., ¶ 8, Dkt. No. 34. It alleges that "[t]he newest evolution of text message marketing has taken the form of 'group messaging' applications, such as defendant GroupMe's service," which was "released" in approximately August 2010. Am. Compl., ¶¶ 10-12. It alleges that GroupMe's "group texting tool" allows people to "request that GroupMe simultaneously transmit SMS text messages to large groups of people *en masse*, using one common cellular telephone number provided by Defendant Twilio." *Id.*, ¶ 11 (emphasis in original).

The Amended Complaint alleges that, to use GroupMe's "service, a customer signs up by

providing basic information through the GroupMe website or mobile application, creates a 'group' of up to twenty-four individuals, and provides the full names and cellular telephone numbers of each group member to Defendant GroupMe." Am. Compl., ¶ 12. It alleges that, when a user signs up for its service, GroupMe "requires the group creator to represent that they have the consent of the individuals they intend to add to a group, which almost never happens." *Id.*, ¶ 13. It alleges that, thereafter, GroupMe, with Twilio, "harvest[s] all phone numbers added by group creators in order to independently send its own text message advertisements promoting its service and mobile applications." *Id.*, ¶ 27.

The Amended Complaint alleges that, on April 23, 2011, Plaintiff received a text message, containing "advertisements of GroupMe's service and mobile application," from a "phone number . . . owned and/or operated by Defendant Twilio, and provided by Twilio to Defendant GroupMe." Am. Compl., ¶¶ 31-32. It alleges that the initial text message to Plaintiff, notifying him he was added to the "Poker" texting group, "was made directly by Defendants and not initiated or consented to by Plaintiff or the group creator." *Id.*, ¶ 34. It alleges that Plaintiff never participated in the "Poker" texting group, yet received a total of fifteen text messages from that group and from GroupMe; the four text messages Plaintiff alleges he received from GroupMe, including the initial message, explained how to avoid text messaging charges, exit the group, notified Plaintiff his non-participation in the group would result in removal from the group, and eventually notified Plaintiff he had, in fact, been removed due to non-participation. *Id.*, ¶¶ 32-41.

The Amended Complaint alleges that, "[a]s a result of Defendants' software and application design, thousands of consumers receive text message calls from and through Defendant GroupMe's service that they never consented to nor wanted." Am. Compl., ¶ 25. It alleges that the text messages received by Plaintiff and others in the proposed class "were made *en masse* and without the prior express consent of the Plaintiff and the other members of the Classes to receive such wireless span." *Id.*, ¶¶ 55-56. It alleges that the text messages Plaintiff received from GroupMe "included advertisements about [its] service and mobile application that were written in an impersonal and generic manner and came from a phone number assigned solely to transmit such text message calls." *Id.*, ¶ 56. It alleges that Twilio and GroupMe sent the

text messages received by Plaintiff and others using "equipment and software . . . that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." *Id.*, ¶ 55.

Based on the foregoing, the Amended Complaint alleges one claim against Twilio and GroupMe for violations of Section 227(b)(1)(A)(iii) of the TCPA, and seeks to certify two classes of plaintiffs; it prays for statutory damages of $500 per text message sent, trebled to $1,500 per text message in the Court's discretion. Am. Compl., ¶¶ 43, 54-60.

Notably, Plaintiff did participate in the "Poker" group despite contrary allegations in the Amended Complaint. On April 23, 2011, he responded to the entire "Poker" group text with his own social text message. Martocci Decl., ¶ 28; Request for Judicial Notice ("RJN") at 4-5. Plaintiff also later registered for a GroupMe account, accepting its terms and conditions of service. Martocci Decl., ¶ 29.

C. The TCPA

In enacting the TCPA in 1991, Congress sought to prohibit telemarketing practices it considered to be an invasion of consumer privacy and a threat to public safety. *See Telephone Consumer Protection Act of 1991*, Pub. L. No. 102-243, 105 Stat. 2394 § 2(5) (1991) (codified at 47 U.S.C. § 227, *et seq.*). Such telemarketing practices included calls made using randomly or sequentially generated telephone numbers that could reach unlisted numbers, hospitals, or other emergency service providers. *See* RJN, Ex. B (137 Cong. Rec. S18317-01 at 2 (1991)); RJN, Ex. C (H.R. Rep. No. 101-633 (1990)); RJN, Ex. D (S. Rep. No. 102-178 at 2 (1991)); and RJN, Ex. E (H.R. Rep. No. 102-317 at 10 (1991)). Accordingly, Congress focused the TCPA's regulations on prohibiting the use of equipment that would enable such intrusive calls.

With regard to calls to cellular telephones, the TCPA provides that: "[i]t shall be unlawful for persons within the United States –

> (A) to make any call (other than a call for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or artificial or prerecorded voice –
>
> * * *
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service,

> specialized mobile radio service or other radio common carrier service, or any service for which the called party is charged for the call.

47 U.S.C. § 227(b)(1)(A)(iii). The TCPA defines an "automatic telephone dialing system" as "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).

In sum, it violates the TCPA to place a non-emergency call to a cellular telephone using an "automatic telephone dialing system" without the "prior express consent" of the called-party. *Knutson v. Reply!, Inc.*, 2011 WL 291076, at *1 (S.D. Cal. Jan. 27, 2011). As discussed in greater detail below, Congress granted the FCC the authority to "prescribe regulations to implement" these TCPA requirements. 47 U.S.C. § 227(b)(2)(C).

IV. ARGUMENT

A. The Amended Complaint Is Insufficiently Pleaded and Must Be Dismissed

Federal Rule of Civil Procedure 8 requires that a complaint "must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. Proc. 8(a)(2). If a complaint fails to meet that requirement, it must be dismissed pursuant to Rule 12(b)(6) for failure "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

To determine whether a complaint states a claim under the requirements of Rules 8 and 12(b)(6), a court must undertake a two-step analysis. First, the court must disregard conclusory allegations and bare recitations of the elements of a claim. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Second, the court must determine whether the well-pleaded factual allegations state a claim that is "plausible," as opposed to merely "possible." *Iqbal*, 129 S. Ct. at 1950; *Twomby*, 550 U.S. at 556, 570. If the well-pleaded factual allegations make it just as likely that the defendant is not liable on the asserted claim, then the plaintiff has not shown entitlement to relief and the complaint must be dismissed. *Iqbal, supra*, 129 S. Ct. at 1949-50; *Twombly, supra*, 550 U.S. at 570; *Reply!, Inc., supra*, 2011 WL 291076 at *2.

Here, the Amended Complaint must contain well-pleaded factual allegations sufficient to

demonstrate that it is more likely than not GroupMe used an "automatic telephone dialing system" to send text messages to the cellular telephones of Plaintiff and the other proposed class members. The only allegation in the Amended Complaint even suggesting GroupMe used such equipment, however, is that the text messages were sent using "equipment and software . . . that, **upon information and belief**, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." Am. Compl., ¶ 55 (emphasis added). That allegation is conclusory; it merely restates the TCPA's definition of an auto-dialer. *Id.*; 47 U.S.C. § 227(a)(1). It is also made on "information and belief," which is insufficient under Rule 8 without supporting, well-pleaded factual allegations. *Kemp v. Int'l Business Machines Corp.*, 2010 WL 4698490, at *4 (N.D. Cal. Nov. 8, 2010).

Indeed, the well-pleaded factual allegations in the Amended Complaint do not support its conclusory auto-dialer assertion; they undermine it by alleging that GroupMe's service did not use features characteristic of an auto-dialer in delivering the "Poker" group's text messages. The Amended Complaint alleges that GroupMe "sends" text messages "*en masse*," "simultaneously" and "at once," not sequentially. Am. Compl., ¶¶ 10-11. It alleges GroupMe "trasnsmit[s] text message calls to dozens of people at once" pursuant to the maximum group size of twenty-five people, not to "thousands of customers" at once. Am. Compl., ¶¶ 10, 12. It also alleges the telephone numbers to which GroupMe "sends" the text messages are provided to GroupMe by group creators, as opposed to being generated by a machine. *Id.*, ¶¶ 12-13.

Further, while the Amended Complaint attempts to shore up its auto-dialer allegation by characterizing the text messages Plaintiff received from GroupMe as "generic advertisements" written in an impersonal manner, the content of the text messages as pleaded refutes such a characterization. Am. Compl., ¶¶ 29, 32-39, 56. According to the Amended Complaint, the first text message Plaintiff received included: Plaintiff's name; the names of the ten other individual members of the group; the customized group name, "Poker," chosen by the group creator; and the telephone number assigned to that group. *Id.*, ¶ 33. The subsequent messages from GroupMe similarly were directed to Plaintiff and provided him with helpful information about GroupMe's service, including how to stop receiving the text messages and how to avoid

text messaging charges. *Id.*, ¶¶ 35, 38-39.

The Amended Complaint does not allege the precise contents of all group-initiated text messages Plaintiff received from the "Poker" group and, for those not set forth in the Amended Complaint, merely alleges they were "generic advertisements" written in an impersonal manner. Am. Compl., ¶ 56. That could not be more inaccurate. The text messages the other "Poker" group members sent to Plaintiff were personalized, social messages. Martocci Decl., ¶ 28; RJN, at 4-5. Plaintiff even used GroupMe's service to respond with his own social message. *Id.*

The Amended Complaint's allegation that GroupMe used an auto-dialer relies entirely on its (1) regurgitation of the TCPA's definition of auto-dialer and (2) mischaracterizations of the nature of the text messages Plaintiff received, which characterizations are contradicted by very contents of the text messages as pleaded and incorporated. Such conclusory allegations must be disregarded under *Iqbal* and *Twombly*, leaving the Amended Complaint devoid of "sufficient factual matter" to suggest GroupMe used an auto-dialer. *Lacey v. Maricopa County*, 649 F.3d 1118, 2011 WL 2276198, *14 (9th Cir. June 9, 2011); *Reply!, Inc.*, 2011 WL 291076 at *2.

Even if the Court finds such allegations to be well-pleaded (which they are not), other well-pleaded allegations make it just as likely GroupMe did not use an auto-dialer. Taken as true, those other allegations show that GroupMe's service did not deliver text messages to Plaintiff using features characteristic of an auto-dialer (*e.g.*, telephone number generation), and that the text messages themselves were personalized for Plaintiff. Accordingly, the Amended Complaint must be dismissed under Rule 12(b)(6) because it is either devoid of well-pleaded factual allegations that GroupMe used an auto-dialer, or it contains contradictory well-pleaded factual allegations that make it just as likely GroupMe did not use such equipment. *Reply!, Inc.*, *supra*, 2011 WL 291076 at *2 (after disregarding conclusory assertions, dismissing TCPA claim where no facts were alleged from which court could infer calls were made using automatic telephone dialing system).

B. The Court Should Dismiss or Stay this Action Under the Doctrine of Primary Jurisdiction

The doctrine of primary jurisdiction allows a court to dismiss a complaint without

prejudice, or to stay a proceeding pending the resolution "of an issue within the special competence of an administrative agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). To invoke the primary jurisdiction doctrine, a court must determine that an "otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the [administrative] agency with regulatory authority over the relevant industry rather than by the judicial branch." *Id.*; *Syntek v. Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). While there is no "fixed formula" for applying the doctrine of primary jurisdiction, the Ninth Circuit traditionally considers four factors: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Clark, supra*, 523 F.3d at 1115.

1. Primary Jurisdiction Is Appropriate If a Case Implicates the FCC's Regulatory Authority Over a Particular Statute

Courts have repeatedly invoked the doctrine of primary jurisdiction when faced with issues requiring construction of telecommunications statutes administered by the FCC. *E.g., Id.; Pac-West Telecomm., Inc. v. MCI Communications Servs., Inc.*, 2011 WL 1087195, at *2 (E.D. Cal. Mar. 23, 2011); *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459 (6th Cir. 2010); *Total Telecomm. Services*, 919 F. Supp. at 478; *Unimat, Inc. v. MCI Telecomms. Corp.*, 1992 WL 391421, at *2 (E.D. Pa. Dec. 16, 1992).

In *Clark*, for example, the plaintiff alleged the defendant violated 47 U.S.C. § 258(a) by "slamming," or switching, a consumer's telephone service without first obtaining the consumer's consent. *Clark, supra*, 523 F.3d at 1112. The statute's prohibitions, however, applied only to "telecommunications carriers" and the defendant, a VoIP provider, argued it did not meet that definition. *Id.* at 1115. The defendant moved to dismiss or stay the action under the primary jurisdiction doctrine, arguing the FCC should be allowed to decide the issue of whether a VoIP provider was subject to the statute's regulations. The defendant argued Congress gave the FCC regulatory authority over telecommunications carriers pursuant to the Telecommunications and

Communications Acts, and the issue of "whether a VoIP provider" is a "telecommunications carrier" had not yet been resolved. *Id.* at 1112. The district court agreed and dismissed the case without prejudice; the plaintiff appealed. *Id.*

On appeal, the Ninth Circuit, in considering the four factors set forth above, noted that the primary jurisdiction doctrine can be invoked where (1) "a claim requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency," and (2) "protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *Clark*, *supra*, 523 F.3d at 1115. At the time of the lawsuit in *Clark*, Congress had entrusted the FCC with regulatory authority over the telecommunications industry and the FCC had "developed a detailed and comprehensive regulatory scheme in response to the statute's instructions." *Id.* at 1115. The "emergence of VoIP technology," however, "created new challenges for the FCC . . . as existing regulations did not contemplate the revolutionary changes IP-enabled services entailed." *Id.* at 1113.

In response to the new technology, the FCC issued a Notice of Proposed Rulemaking, seeking comment "on how to define and to regulate all IP-enable services, including VoIP, while maintaining its 'established policy of minimal regulation of the Internet and the services provided over it." *Clark*, *supra*, 523 F.3d at 1113. The Notice of Proposed Rulemaking specifically solicited comments on "whether VoIP services should be classified as 'telecommunications services." *Id.* In light of the foregoing, the Ninth Circuit found that the plaintiff's claim raised a "question of first impression" and that the FCC's Notice of Proposed Rulemaking showed the agency was "actively considering" how to resolve it. *Id.* at 1115. The Ninth Circuit affirmed the district court's ruling, stating that it was "important to federal telecommunications policy" for the FCC to develop a "uniform regulatory framework to confront this emerging technology." *Id.*

2. Congress Has Entrusted the FCC With Comprehensive Regulatory Authority Over the TCPA

In enacting the TCPA, Congress expressed concern that a multiplicity of inconsistent state telemarketing regulations would "frustrate the federal objective of creating uniform national rules." *See* RJN, Ex. H (*In re Rules and Regulations Implementing the Telephone Consumer*

Protection Act of 1991, Report and Order, 18 FCC Rcd. 14014, 14415 (July 3, 2003) ("2003 Report and Order"), ¶ 83). Congress wanted to "promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations" and, therefore, charged the FCC with "prescrib[ing] regulations to implement the requirements" of the TCPA. *Id.*; 47 U.S.C. § 227(b)(2)(C). As the Sixth Circuit has explained:

> Congress vested the FCC with considerable authority to implement the [TCPA]. The Act gives the agency power to "prescribe regulations to implement" the legislation, 47 U.S.C. §§ 227(b)(2), 227(c)(1), 227(c)(2), to exempt calls from the requirements of the Act, *id.* §§ 227(b)(2)(B), 227(b)(2)(C), to intervene in suits filed by state attorneys general, *id.* § 227(f)(3), and to enforce the provisions of the Act and its accompanying regulations, *see, e.g.*, 22 FCC Rcd 19396 (Nov. 9, 2007); 20 FCC Rcd 18272 (Nov. 23, 2005). In addition to these law-making and law-enforcing powers, the FCC has interpretive authority over the . . . Act, *see Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), and its accompanying regulations, *see Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

Charvat, supra, 630 F.3d at 466-67. Further, Congress intended to give the FCC "flexibility to consider what rules should apply to future technologies as well as existing technologies." *See* RJN, Ex. F (137 Cong. Rec. S18781 at 8 (1991)).

According to its Congressionally-granted authority, the FCC has, since 1992, created a complex regulatory TCPA scheme and intermittently adopted regulations addressing particular aspects of the statute. One such issue the FCC has addressed, in part, is "prior express consent." In 1992, the FCC stated that persons give prior express consent when they "knowingly release their phone numbers;" such persons "have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *See* RJN, Ex. G (*In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 (September 17, 1992) ("1992 Report and Order"), ¶ 31 (citing Congressional record for support)), RJN, Ex. V (*In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, FCC 07-232 (December 28, 2007) ("2007 FCC Ruling"), ¶ 9).

District courts, including those in this district, have acknowledged the FCC has the authority to adopt that interpretation of "prior express consent" and district courts lack jurisdiction to challenge it. *Leckler v. Cashcall, Inc.*, 2008 U.S. Dist. LEXIS 97439, at *6 (N.D.

Cal. Nov. 21, 2008) (vacating earlier ruling contradicting FCC's interpretation because it was "the agency's final decision interpreting 'prior express consent" and the court lacked jurisdiction to review it); *see, e.g., Greene v. DirecTV*, 2010 U.S. Dist. LEXIS 118270, *2-3 (N.D. Ill. Nov. 8, 2010); *Starkey v. Firstsource Advantage, LLC* 2010 U.S. Dist. LEXIS 60955, *13 (Mar. 11, 2010 W.D.N.Y.) ("the proper vehicle" to challenge to FCC's ruling is to "file a petition for review of the FCC's final order in the Court of Appeals"). Nonetheless, the FCC has not yet determined the "precise form," *i.e.*, written or oral, in which "prior express consent" must be obtained, and the statute is silent on the issue. *See* RJN, Ex. L (*In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 25 FCC Rcd 1501, 1510 (January 20, 2010) ("2010 Notice of Proposed Rulemaking"), ¶ 17).

The FCC has also adopted some regulations implementing the TCPA's prohibition on auto-dialers. In 1992, the FCC adopted a regulatory definition of auto-dialer that simply copies the TCPA's definition and, in 2003, found that "predictive dialers," which dial numbers at a particular rate to ensure a sales person is available to speak when a customer answers the call, meet that definition. 47 C.F.R. § 64.1200(f); *see* RJN, Ex. H (2003 Report and Order, ¶ 133). The FCC has also found that the TCPA prohibits using "auto-dialers" to send text messages to cellular telephones, but has not revised its 1992 definition of "auto-dialer" and has never defined "automatic telephone dialing system" for purposes of text messaging. RJN, Ex. H (2003 Report and Order, ¶ 165).

a. The FCC's Current, Parallel TCPA Proceeding Will Address the Statute's Consent Requirement

On January 22, 2010, the FCC issued it 2010 Notice of Proposed Rulemaking. The 2010 Notice of Proposed Rulemaking recognizes, in relevant part, that the TCPA's Section 227(b)(1)(A) creates a defense for auto-dialed calls made with a called-party's "prior express consent," but that the TCPA is "silent regarding the precise form of such consent (*i.e.*, oral or written)." RJN, Ex. L (2010 Notice of Proposed Rulemaking, ¶ 17). It also recognizes that the TCPA is silent regarding the content of the consent required to help "ensure that consumers are

adequately apprised of the specific nature of the consent that is being given and, in particular, of the fact that they will receive prerecorded calls as a consequence of their agreement." *Id.*, ¶ 19.

The only regulations adopted by the FCC thus far affecting "prior express consent" in the context of calls to cellular telephones are those discussed above, and the FCC is now "seek[ing] comment[s] on whether [it] should conform [its] TCPA rules to the FTC's Telemarketing Sales Rule by . . . requiring sellers and telemarketers to obtain telephone subscribers' express written consent (including electronic methods of consent) to receive prerecorded telemarketing calls." RJN, Ex. L (2010 Notice of Proposed Rulemaking, ¶ 2). Importantly, the 2010 Notice of Proposed Rulemaking clarifies that the FCC seeks comment regarding the consent required to auto-dial both residential land lines **and "cellular services"** governed by Section 227(b)(1)(A). *Id.*, ¶ 20 ("any written consent requirement adopted by the Commission should apply to both provision") (emphasis added).

In response to the 2010 Notice of Proposed Rulemaking, a number of commentators have urged the FCC to tailor its proposed rules on prior express consent to the underlying purpose of the TCPA – preventing unwanted telemarketing. Those commentators suggest that the FCC only require written consent, if at all, for "telemarketing' or 'telephone solicitation' calls," as opposed to calls that "do not solicit business." *See* RJN, Ex. R (Reply Comments of Portfolio Recovery Associates, LLC, CG Docket No. 02-278 at 2 (filed June 21, 2010)); RJN, Ex. O (Notice of *Ex Parte* Presentations, CG Docket No. 02-278 by Encore Capital Group, Inc., at 1 (filed May 5, 2011) ("Encore Presentation")); RJN, Ex. S (Reply Comments of the Cargo Airline Association, CG Docket No. 02-278 at 2 (filed June 21, 2010) ("CAA Reply Comments")); RJN, Ex. J (*FCC Public Notice*, 24 FCC Rcd 13635 (CGB 2009) (seeking comment on a petition for declaratory ruling filed by Club Texting, Inc. on the treatment of text broadcasters under the TCPA)).

Other commentators such as the United Parcel Service ("UPS") have similarly asked the FCC to exempt from any written consent requirement those "informational" calls and SMS text messages sent to a called-party "when there is [a] relationship between the call recipient and the party on whose behalf the call is made." *See* RJN, Ex. T (Comments of the United Parcel Service, Inc. in Response to Global Tel*Link Corporations Petition for Declaratory Ruling at 1

(filed July 15, 2010) ("UPS Comments")). The UPS Comments explain that UPS relies on text messaging to send shippers and package recipients delivery notifications; "[t]he telephone numbers used by UPS for . . . delivery notifications are provided by UPS's customer, the shipper, so that the customer and/or the package recipient will be notified of the delivery." UPS Comments at 3. It would "be impossible for UPS to obtain prior written consents from the package recipients." *Id.*

In essence, these commentators urge that, if the FCC adopts a rule requiring written consent, that it also recognize a party may have authority to release another's telephone number, thereby consenting on that other party's behalf to receive informational text messages. *Id.*; *see also* RJN, Ex. S ((CAA Reply Comments at 3) (the Commission should "extend[] the exemption from the ban on pre-recorded calls for nonsolicitation commercial calls to encompass cell phone, as well as residential phone calls")).

b. The FCC's Current, Parallel TCPA Proceeding Will Likely Address What Constitutes An Auto-Dialer

A number of commentators have also asked the FCC to refine the definition of automatic telephone dialing system in light of technological advances in the past twenty years. Wells Fargo Bank, N.A.'s Comment best illustrates the application of this position to the current definition of "auto-dialer," stating that the FCC's identification of certain features that render equipment an "auto-dialer" under the TCPA:

> [L]eads to the unacceptable result that the definition of "automated telephone dialing system" expands without limits as technology advances. The "capacity to store or produce telephone number," once a rare functionality, has become commonplace among numerous consumer electronics products, including the ubiquitous smartphone. Likewise, businesses use devices that feature a broad range of storage and dialing capacities, not all of which might be used in calling campaigns. If the autodialer restriction is activated by any use of a system with this dormant "capacity," then businesses and ordinary consumers are unwittingly violating this law every day.

RJN, Ex. U (Comments of Wells Fargo & Co., at 20 (filed May 21, 2010)). Likewise, JPMorgan Chase & Co. commented:

> [T]he Commission should reassess its prior decisions and clarify that an automated dialing technology must actually use a random or sequential number generator to come within the TCPA definition. Thus, loading existing customer telephone

> numbers onto the equipment without the random or sequential generation and dialing capability activated would not be deemed the use of an autodialer.

RJN, Ex. N (Reply Comments of JPMorgan Chase & Co., CG Docket No. 27-278, at 5 (filed June 21, 2010)); *see also* Encore Presentation at 1.

Several other entities, including the CTIA and the MMA, have raised the same issue in the context of sending text messages to cellular telephones. RJN, Ex. P (Reply Comments of CTIA, CG Docket No. 02-278, at 2-3 (filed June 21, 2010) ("CTIA Reply Comments")); RJN, Ex. Q (Comments of Sprint Nextel, CG Docket No. 02-278, at 5-6 (filed May 21, 2010)). The MMA explained that "[w]hen communicating with a customer through an SMS message, marketers are limited to 160 character messages;" "marketing through mobile messaging has a very different user experience than a voice call and therefore terminology, as expressed in the TCPA, does not apply." RJN, Ex. W (Comments of the Mobile Marketing Association, CG Docket No. 02-278, at 3 (filed May 21, 2010) ("MMA Comments")). The MMA further explained that "[t]he technology used in sending mobile messages is very different than the technology used for pre-recorded or live voice calls," and urged the FCC to recognize "the distinct method of marketing via message . . . in relation to their purpose of communicating with customers through electronic means." *Id.* at 4.

3. Uniform Administration of the TCPA Requires Dismissal or A Stay of This Action Pending Resolution of the Parallel FCC Proceeding

This action squarely presents the Court with the "prior express consent" and "auto-dialer" issues already before the FCC in its parallel proceeding pursuant to the 2010 Notice of Proposed Rulemaking. The Amended Complaint alleges that GroupMe asks text message group creators to consent to receiving text messages and to obtain similar consent from those individuals they add to any group. Am. Compl., ¶ 13. It alleges four separate times that Plaintiff did not consent to receiving text messages from his "Poker" group or from GroupMe. *Id.*, ¶¶ 34, 36, 40-41. It further alleges that the text messages Plaintiff did receive "were [sent] *en masse* and without the prior express consent" of Plaintiff or the other class members "to receive such wireless spam." *Id.*, ¶ 56. GroupMe disputes such allegations.

GroupMe obtained the required "prior express consent" of the called-parties pursuant to the TCPA and the FCC regulations, particularly the 1992 Report and Order which is binding on the Court. Those individuals who received text messages knowingly released their telephone numbers to GroupMe, either directly when signing up for its service and agreeing to its terms and conditions, or indirectly through the group creators. The TCPA and the FCC regulations are, however, a blank slate regarding the required form and content of the "prior express consent" necessary to send a text message to a cellular telephone. The FCC has acknowledged as much and now, to foster uniform application of the TCPA's requirements, seeks to determine those issues for the first time pursuant to its Congressionally-mandated authority to do so. *See Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1075-76 (9th Cir. 2010) (remanding to district court for consideration of dismissal where district court refused to dismiss case under primary jurisdiction doctrine when ongoing proceedings by administrative agency concerned the same issue presented in the litigation), *petition for cert. filed*, 80 U.S.L.W 3058 (U.S. Jul. 15, 2011) (No. 10A1077).

The prior express consent issue fits squarely within the Ninth Circuit's holding in *Clark* because it is a threshold issue of first impression; if GroupMe can show it obtained prior express consent from Plaintiff and other proposed class members in whatever form is required, it will not be subject to the TCPA's prohibition against using an auto-dialer and all other issues in this case become irrelevant. *See Clark*, *supra*, 523 F.3d at 1114-16 (Time Warner's alleged status as "telecommunications carrier" would decide if it was subject to 47 U.S.C. § 258(a)'s prohibitions against "slamming"). The form and content of the required prior express consent is indisputably within the FCC's Congressionally-granted regulatory authority to regulate the TCPA and has been clearly identified in the 2010 Notice of Proposed Rulemaking as a yet-undecided issue the FCC intends to resolve.

Similarly, GroupMe's technology does not constitute an auto-dialer. It is technologically incapable of storing or producing telephone numbers to be called using a random or sequential number generator. It is technologically incapable of dialing such numbers. Martocci Decl., ¶ 16. As alleged in the Amended Complaint, technology such as GroupMe's group texting tool is

"emerg[ing]," "alternative" and the "newest evolution" of text messaging. Am. Compl., ¶¶ 7-8, 10. The text messages Plaintiff or any other proposed class member received are initiated by either a group creator or another member of the group. The group creators provide GroupMe the telephone numbers and the group members provide GroupMe with the text message contents; GroupMe interacts with Twilio to route and deliver those user-initiated text messages over the Internet using long code to their destinations as determined by the group creator. The FCC has never adapted the definition of auto-dialer to address this kind of group text messaging technology, and not even the industry leading trade organizations have attempted to adopt best practices for such uses of long code.

The features currently used by the TCPA and the FCC to describe an "auto-dialer," which were arguably rare when the TCPA was enacted, are now "commonplace among numerous consumer electronics products." In essence, the definition of auto-dialer is outdated. For example, a smartphone could be an auto-dialer because it may have the "capacity to store or produce telephone numbers," and someone would, therefore, violate the TCPA by using a smartphone to send any text message, regardless of whether the message is commercial in nature. As highlighted by the Comments submitted to the FCC on this issue, the TCPA's definition of "auto-dialer" is antiquated and unworkable; it cannot consistently be applied by courts to the wide array of new and emerging technologies such as GroupMe's group texting tool, particularly if the TCPA does not distinguish between telemarketing and informational text messages.

The "auto-dialer" issue, while not expressly identified for resolution in the 2010 Notice of Proposed Rulemaking, has been raised in an overwhelming number of Comments advancing the same concerns raised in this case and in many others. The Court is not prevented from invoking the primary jurisdiction doctrine on this issue simply because there is no administrative notification that an agency proceeding pending will address the matter. *Syntek*, *supra*, 307 F.3d at 782. All that is required is a finding that the issue presented to the Court has not yet been decided and is more properly decided by the administrative agency with the appropriate expertise and regulatory authority to do so. *Clark*, *supra*, 523 F.3d at 1114. If Plaintiff thereafter wants the matter resolved, he can pursue administrative remedies before the FCC. *Syntek*, *supra*, 307 F.3d

at 782.

Any attempt in this litigation to resolve whether GroupMe had "prior express consent" or whether its technology constitutes an "auto-dialer" will deprive the Court and the litigants of the FCC's unique "expertise and experience" in this area. *Syntex*, 307 F.3d at 781. It will also create the potential to cause just the type of inconsistent applications of the TCPA Congress sought to avoid, with different courts reaching different determinations over what constitutes sufficient "prior express consent" and which group texting technologies amount to an "automatic telephone dialing system." The risk for such inconsistencies is very real as there are other GroupMe-type group text messaging services in the marketplace, including Google Huddle, Facebook Messages, Beluga, Fast Society and Google's Disco. Martocci Decl., ¶ 6. At least one of those services has already been sued under the TCPA, and numerous other TCPA text message actions are pending where a key issue is whether the technology used constitutes an "auto-dialer." Declaration of J. Jonathan Hawk ("Hawk Decl."), ¶ 7; *Charvat, supra*, 630 F.3d at 466 ("the volume of [pending] lawsuits heightens the risk that individuals and companies will be subject to decisions pointing in opposite directions").

In sum, these issues of first impression should be left to the FCC to decide because of their technical nature, the FCC's unparalleled experience addressing new technologies, Congress' intent to have the FCC adopt regulations on new technologies potentially implicated by the TCPA, and the FCC's current proceeding. The FCC is in the midst of that decision-making process, and any judicial determination of these questions could be at odds with whatever the FCC decides pursuant to the complex regulatory structure it has implemented for the TCPA. *See, e.g., Clark*, 523 F.3d at 1115; *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002).

C. In the Alternative, This Action Should be Transferred to the Eastern District of Virginia Pursuant to 28 U.S.C. Section 1404(a)

"For the convenience of [the] parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The purpose of Section 1404(a) "is to prevent the waste of

time, energy and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense." *Gerin v. Aegon USA, Inc.*, 2007 WL 1033472, at *3 (N.D. Cal. Apr. 4, 2007) (citations omitted). The decision to transfer venue under Section 1404(a) is left to a court's discretion. *See, e.g., PRG–Schultz USA Inc. v. Gottschalks, Inc.*, 2005 WL 2649206, at *2 (N.D. Cal Oct. 17, 2005) (citing *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000)).

1. Factors To Consider

In determining whether transfer is warranted, a court weighs multiple factors: (a) the plaintiff's choice of forum; (b) the parties' contacts with the plaintiff's chosen forum, including those contacts relating to plaintiff's claim; (c) the location of likely witnesses; (d) the differences in the cost of litigation in the two forums; (e) the availability of compulsory process to compel attendance of unwilling non-party witnesses; (f) the ease of access to sources of proof; and (g) the relative congestion of the two potential forums. *See, e.g., Jones, supra,* 211 F.3d at 498-99; *PRG–Schultz, supra,* 2005 WL 2649206, at *2; *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1156 (S.D. Cal. 2005).

"A plaintiff's choice of forum is given 'much less weight' when the plaintiff is **not** a resident of the chosen forum" and even less weight when the plaintiff seeks to bring a putative class action. *PRG–Schultz, supra,* 2005 WL 2649206, at *2 (emphasis added); *see Fabus Corp. v. Asiana Express Corp.*, 2001 WL 253185, at *1 (N.D. Cal. Mar. 5, 2001); *Lou v. Belzberg,* 834 F.2d 730, 739 (9th Cir. 1987); *see Alexander v. Franklin Res., Inc.*, 2007 WL 518859, at *3 (N.D. Cal. Feb. 14, 2007). Moreover, "[i]f the operative facts have not occurred within the forum … [the plaintiff's] choice is entitled to only minimal consideration," and a court can disregard a plaintiff's choice of forum where it appears he was merely forum-shopping. *Lou, supra,* 834 F.2d at 739; *Alexander, supra,* 2007 WL 518859, at *4.

2. Plaintiff Has No Significant, Relevant Contacts With This District And The Court Should Disregard His Choice of Forum

The operative facts of this case occurred in Virginia. Plaintiff is a Virginia domiciliary, received the text messages alleged in the Amended Complaint on his Virginia cellular telephone

number, and those text messages were initiated by someone else with a Virginia cellular telephone number who added Plaintiff to a GroupMe texting group. Am. Compl., ¶ 2; *see* Martocci Decl., ¶¶ 28, 30; RJN at 1, 4-5. Further, Twilio's primary computer servers and GroupMe's only servers utilized to deliver the text messages are located in Virginia. *See* Martocci Decl., ¶¶ 18, 24-25.

The Amended Complaint does not allege any contacts between Plaintiff and California, let alone the Northern District, and there are no allegations that either GroupMe or Twilio does significant business in this district pertaining to the text messages Plaintiff received in April 2011. *See Saleh*, 361 F. Supp. 2d at 1158 (claims had no material connection with state despite the fact defendant was headquartered there where conduct at issue took place elsewhere); *PRG-Schultz*, 2005 WL 2649206, at *4 (factor weighed in favor of transfer where no allegation that any events giving rise to action took place in district). Indeed, the only party to this lawsuit with notable connections to California is Twilio, a Delaware corporation with its headquarters here; GroupMe is a Delaware corporation with its headquarters in New York City.

Plaintiff could have filed his lawsuit in the Eastern District of Virginia as he is domiciled there, both GroupMe and Twilio are subject to personal jurisdiction there, and venue would be proper. 28 U.S.C. § 1391(b)(2). Nonetheless, Plaintiff did not file this lawsuit in his home state despite the obvious connections of his claim to that forum; instead, he sued on behalf of a putative nationwide class across the country in California, which has minimal if any contacts to the parties and Plaintiff's claims. The Court can and should, therefore, infer that Plaintiff was simply forum shopping and give his choice of this forum little weight, if any.

3. The Locations of Key Witnesses and Evidence Favor Transfer

The bulk of Defendants' operations and personnel are physically located on the east coast. GroupMe's only office is in New York City. Martocci Decl., ¶¶ 4,19, 22-26. Decisions pertaining to GroupMe's systems configuration and content were made in New York. Martocci Decl., ¶ 26. The underlying computer operations and systems that executed the text messages in question occurred on GroupMe and Twilio's respective systems housed in Virginia. Martocci Decl., ¶¶ 18, 24. As discussed above, Plaintiff and his poker buddies, who were part of the

"Poker" group and sent him the text messages, used wireless phone numbers with a Richmond, Virginia area code (804), suggesting they all reside there. Am. Compl., ¶ 33; RJN at 1.

If would be significantly more convenient for Plaintiff, GroupMe, and many of the key witnesses if venue were in Virginia. Plaintiff and the Virginia-based witnesses would already be in the same state as the proceeding, and GroupMe would be located less than a two-hour flight away. By contrast, if the case proceeds here, Plaintiff, the other "Poker" group members, and GroupMe's personnel will be required to take a five to six-hour flight to San Francisco. Martocci Decl., ¶¶ 22-26; Hawk Decl., ¶¶ 2-6; RJN, Ex . A and at 1. GroupMe anticipates calling only one witness from California-based Twilio and it will be significantly more convenient for all but that witness if the case proceeds in Virginia. Hawk Decl., ¶ 3. This factor, which is of particular significance in considering whether to transfer, favors Virginia. *See* 15 Charles Allan Wright, et al., FEDERAL PRACTICE AND PROCEDURE, JURISDICTION 3d § 3851 (3d ed. 2006) ("if some other forum will serve the convenience of witnesses better, a motion to transfer . . . [is] likely to be granted"); Hawk Decl., ¶¶ 2-6.

4. The Remaining Factors Favor Transfer

Cost, availability of compulsory process, ease of access to proof, and the congestion of the respective districts all weigh in favor of transfer. Given the locations of the parties and witnesses, it would be far less costly to litigate in Virginia. Most notably, travel time and expenses for key witnesses would be greatly reduced. RJN, Ex. A. Also, as key non-party witnesses, such as the members of the "Poker" group, reside in Virginia, they are not subject to compulsory process by this Court and GroupMe would not be able to compel them to testify at trial. Fed. R. Civ. P. 45(b)(2); *Saleh*, 361 F. Supp. 2d at 1160 ("While the convenience of party witnesses is a factor to be considered, the convenience of non-party witnesses is the more important factor") (citations omitted). Transferring the case to the Eastern District of Virginia would ensure that the parties may invoke the trial court's subpoena power to command the presence of such non-party witnesses.

As to the evidence, much of the expected discovery would be on the east coast. All of GroupMe's documents pertaining to its service are in New York. Plaintiff and his "Poker"

group buddies are located in Virginia, as are the servers. Martocci Decl., ¶¶ 22-26; Hawk Decl., ¶¶ 2-6; *Saleh*, 361 F. Supp. 2d at 1166 (consideration is convenience of access to proof, not its availability). Finally, the Eastern District of Virginia's ability to bring a civil case to completion in a significantly shorter amount of time than in the Northern District of California favors transfer. *See* http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2011Mar.pl (11.5 vs. 21.2 months); *Saleh*, 361 F. Supp. 2d at 1167. The average civil case load of judges in this district is greater than that of judges in the Eastern District of Virginia. *See id.* (454 cases per judge v. 312 cases).

* * *

The only factor weighing against transfer is Plaintiff's choice of this forum. That choice, however, should be accorded little, if any, weight because Plaintiff is forum shopping. *Fabus*, 2001 WL 253185, at *2 (granting motion to transfer where only factor against transfer was plaintiff's choice of forum). The Court should exercise its discretion to transfer this action to the Eastern District of Virginia, Richmond Division, because that forum has a more significant interest in resolving this dispute brought by and involving residents and equipment located in Virginia. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 2006 WL 4568798, at *6 (C.D. Cal. Nov. 30, 2006) (interest of justice served by transferring case to forum with greater interest in resolution of the action despite plaintiff's residence in transferor forum).

V. CONCLUSION

For the foregoing reasons, GroupMe respectfully requests that the Court dismiss the Amended Complaint for failure to state a claim, dismiss or stay the action pursuant to the doctrine of primary jurisdiction, or, in the alternative, transfer the action to the Eastern District of Virginia, Richmond Division.

Dated: October 6, 2011

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